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No. 84-1004

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCALS 329 AND 851, AFL-CIO, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in selecting the ratio-rank method for merging the seniority lists of four local unions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) and the order of the district court (Pet. App. 6a-10a) were unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1984. A petition for a writ of certiorari was filed on December 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge the method used to merge the seniority lists of previously segregated longshoremen's locals.

1. In 1969, the United States Attorney General filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the International Longshoremen's Association (ILA), the South Atlantic and Gulf Coast District of the ILA, and 37 local unions (Pet. App. 34a-35a).[1] The Attorney General sought to end the practice of maintaining segregated longshore locals in the ports of Texas. In 1975, the court of appeals held that the practice was unlawful and ordered that the locals be merged. *EEOC* v. *ILA*, 511 F.2d 273 (5th Cir.), cert. denied, 423 U.S. 994 (1975). Five years later, the court reaffirmed its merger order in an appeal involving only the four Galveston locals, including petitioners. *EEOC* v. *ILA*, 623 F.2d 1054 (5th Cir. 1980), cert. denied, 451 U.S. 917 (1981).

Prior to the merger, the Port of Galveston consisted of four longshore locals segregated on the basis of race and national origin. The petitioners, Locals 851 and 329, were black; Local 307 was white; and Local 1576 was Mexican-American (*EEOC* v. *ILA*, 623 F.2d at 1055). The white local and the larger black local, 851, performed "deep sea" cargo work. The smaller black local, 329, was permitted to work only for four stevedoring companies. The Mexican-American local was confined to "green fruit" work. Pet. 13-14. There was little green fruit work available at the time the Mexican-American local came into existence; at the

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[1]Effective March 1974, the Attorney General's authority to bring a Title VII action alleging a pattern or practice of discrimination was transferred to the Equal Employment Opportunity Commission (EEOC). Pursuant to 42 U.S.C. 2000e-6(d) and (c), this suit was continued without abatement and the EEOC was substituted as a party.

time of the merger, however, this work comprised approximately a quarter of the total longshore work in Galveston, and was gradually increasing (Pet. App. 7a).[2]

The locals each used different criteria for determining seniority. The Mexican-American local's requirements for a year's seniority were low — until 1968 a worker could obtain one year's seniority by working only one boat per year; from 1968 to 1972 the requirement was 20 boats per year; and in 1972 it was changed to 300 hours. The smaller black local always required 400 hours of work each year for a year's seniority. The larger black local and the white local have, since 1951, required at least 700 hours each year to obtain a year's seniority. Pet. 5.

2. The district court established in each port, including Galveston, a merger committee of the local unions to resolve all merger issues (see Pet. App. 30a). If a committee could not agree, the governing ILA District was directed to make recommendations (*ibid.*).[3] Because the four local unions in Galveston could not agree on a method for merging their seniority lists, the ILA District submitted its recommendation (Pet. App. 7a). The ILA District recommended that individual longshoremen be given credit for seniority in accordance with the criteria recognized by each local and that no local experience either a windfall or a significant loss of work opportunities because of the merger

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[2]For the years 1980 through 1982, the white local performed 38% of the work, and had 35% of the workers; the larger black local performed 30% of the work with 21% of the workers; the smaller black local performed 6% of the work with 9% of the workers; and the Mexican-American local performed 26% of the work with 34% of the workers. C.R. 334, at 19 ("C.R." refers to the clerk's record in the district court.)

[3]The court explained that "decisions affecting the day-to-day operations of longshoremen's unions are best made by longshoremen not federal courts" (see C.R. 334, at 4).

(see C.R. 29a; Memorandum in Support of District's Recommendations Regarding Seniority Roster 9). It recommended use of a modified "ratio-rank" method as the most effective means of achieving that goal (C.R. 330; 3/11/83 Tr. 25, 27-28). Under that method, each longshoreman's position on the merged list approximates his position on the former list of his local, with some weighting to reflect the differing sizes of the three locals. Thus, if a worker was located in the top 25% of his local's seniority list, he retains that position in the merged list; if the worker was in the bottom quarter, he retains that position (compare C.R. 370A and 370B).

After entertaining objections and counterproposals to that recommendation the district court adopted the ILA District recommendation, finding that the ratio-rank method "precludes a windfall or loss to any group" and that (Pet. App. 7a),

> [g]iven the unique relationship and history among the various locals in Galveston, and the fact that Local 1576 [the Mexican-American local] is actually "bringing" work to the merger that was not heretofore available to members of other locals, the Court finds that the application of the ratio-rank method would effect the fairest merger of seniority lists in Galveston.

The court directed that the local seniority rosters be merged on the ratio-rank basis (*id.* at 7a-8a).[4]

The two black locals appealed and the court of appeals affirmed (Pet. App. 1a-2a). The court of appeals found that the district court had not abused its discretion in ordering

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[4]The district court first ordered that the seniority rosters of the two black locals be merged on a straight "length of service" basis, with ties decided by lot, in order to equalize the size of the black, white and Mexican-American lists (Pet. App. 7a). No party has objected to this part of the court's order.

use of the ratio-rank method. The court concluded: "Preserving the work expectancies [of the longshoremen] through use of the ratio-rank formulation for merger of seniority lists of existing unions into new Local 20 at the Port of Galveston was a fair resolution of the equitable issues presented to the district court" (*ibid.*).

ARGUMENT

Petitioners do not suggest any sound reason why the Court should review the court of appeals' decision that the district court did not abuse its discretion in ordering use of the "ratio-rank" method.

1. Title VII vests the district courts with broad equitable discretion to fashion appropriate orders to remedy unlawful discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). In undertaking the complex task of merging the Galveston locals' seniority lists — a task that has been termed "notoriously difficult" (*Truck Drivers Local 568* v. *NLRB*, 379 F.2d 137, 142 (D.C. Cir. 1967) — the district court acted well within the scope of its discretion in selecting the ratio-rank method.[5] Indeed, where, as here, the merging entities' seniority standards are vastly different, it is considered preferable to utilize a ratio-rank procedure in order substantially to maintain the same seniority privileges as persons enjoyed prior to the merger (see Kennedy, *Merging Seniority Lists*, in *Labor Arbitration & Industrial Change — Proceedings of the 16th*

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[5]Merger of seniority systems is frequently a thorny issue when bargaining units are consolidated because of business mergers, and "courts have approved a wide variety of systems for merging seniority lists of entities that are consolidating their operations" (*Smith* v. *Baltimore & O.R.R.*, 485 F. Supp. 1026, 1029 (D. Md. 1980)).

Annual Meeting of the National Academy of Arbitrators (M. Kahn ed. 1963)).[6]

Petitioners have cited no cases that suggest that the ratio-rank method of merging seniority systems is an inappropriate remedy under Title VII. Instead, conceding "that a merger of the seniority lists in a manner that is equitable is at best difficult" (Pet. 14),[7] they propose that this Court order the use of one of two alternative methods. Petitioners propose, first, that the seniority systems should be merged on a "follow the work" principle. Under this approach, separate seniority lists would be maintained for different types of work so that workers would be able to continue to perform the type of work they performed previously (*ibid.*). However, as petitioners acknowledge (*ibid.*), the "follow the work" method is inappropriate because the object of this litigation was to merge the unions and end segregated work opportunities. It would run counter to the entire purpose of Title VII relief to establish separate seniority lists and allocate placement on those lists using the past limitations on the type of work each local could undertake. That would perpetuate, not eliminate, segregation.[8]

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[6]As stated by Professor Kennedy (at 27 (citation omitted)):

> [the ratio-rank method] eliminates the windfalls and losses in seniority rights which occur if the length of service principle is employed to consolidate two seniority lists which have considerable difference in their length-of-service structure. When the ratio-rank principle is used, the employees retain their relative positions on the merged seniority list. It is argued that "this substantially maintains the same seniority privileges as the persons enjoyed under the two separate lists."

[7]As the district court aptly observed, "only the good Lord himself could design a system that all of [the union members would] think is perfect. * * * So I've just got to do what is the fairest for the most" (C.R. 385; Tr. 58.

[8]Petitioners suggest (Pet. 15) that this problem might be avoided by merging the four seniority lists in a manner that they do not explain, but

Petitioners' second alternative, the "length of service" proposal (Pet. 15), is also flawed. As we understand it, longshoremen would be slotted into a merged seniority roster according to their years of service, as defined by the standard of the local to which each belonged. This method would treat longshoremen "as if they had always been employed by the same company" (Pet. 15) when, in fact, they were not. The main result of the application of this method would be enhancement of the seniority of black workers at the expense of Mexican-American workers.[9] Petitioner cites no authority establishing that the length of service method is mandatory, or even preferable.

2. Petitioners claim (Pet. 8-13) that the court's remedial order conflicts with *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), because it "divests" their members of accrued seniority. This argument misconstrues the nature of the district court's order. The fact that the first man on the roster of the Mexican-American local may have earned credit for one year of service by working 300 hours a year, whereas the first man on petitioners' roster may have had to work 700 hours to earn a year's credit, does not alter the fact that each was at the top of his roster and was

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that sounds like the "absolute-rank" method (see Kennedy, *supra*, at 22-26). Application of this method is warranted only when all seniority lists are about the same size (*id.* at 24-25). If applied as petitioners appear to suggest, it would provide a windfall to their members, since they are the two smallest locals.

[9]Under petitioners' length of service approach, the Mexican-American local would receive only 3 of the first 50 and 17 of the first 100 slots on the merged roster, though they are bringing 34% of the workers and 26% of the work to the merger. Petitioners, on the other hand, with 30% of the men and 36% of the work, would garner 32 of the first 50 and 58 of the first 100 slots. See C.R. 370B. At the other end of the list, members of the Mexican-American local would occupy 40% of the bottom half of the slots, while petitioners' members would occupy only 24.3% of those slots (*ibid.*).

entitled to work at will. It is that work expectation which the court sought to protect by the use of the ratio-rank method to merge the seniority lists. No one has been divested of anything.[10] The court's decision is not inconsistent with *Firefighters' Local Union No. 1784* v. *Stotts, supra,* which did not involve the merger of seniority systems. Nothing in the Court's opinion is contrary to the district court's decision in this case, which did not divest workers of their seniority rights, but rather sought to protect those rights by using the ratio-rank method to maintain substantially the same work opportunities for employees on the merged roster as they had on their prior seniority lists.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted.

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[10]Petitioners suggest in passing (Pet. 8) that the district court's order somehow affects post-employment benefits. There is no support for this contention, since the merged seniority list only determines day-to-day hiring prioirities. In any case, petitioners do not explain how their members have been divested of any such benefits.

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